Mat Salleh v Mat Adam bin Jusoh & Ors

HIGH COURT (KOTA BHARU) – CIVIL SUIT NO 234 OF 1983
ABDUL MALEK J
1 MARCH 1988

Civil Procedure – Parties – Plaintiff the administrator of estate of deceased owner of land – Dispute as regards part of land – Undisputed portion transmitted to persons not parties to action – Action only as regards disputed portion – Whether plaintiff has locus standi to bring action on behalf of estate

Evidence – Allegation of fraud – Burden of proof

Land Law – Boundary dispute – Dispute over area of lot – Findings made at land scheme hearings and on appeal to district officer – Whether court should interfere – Kelantan Land Settlement Ordinance 1955, ss 10 & 16

This case involved a land boundary dispute between the plaintiff and the defendants. The plaintiff stated in his statement of claim that he was suing as the administrator of the estate of a deceased person ('the deceased') who was the registered proprietor of Lot 769. The plaintiff alleged that the defendants,who were the registered proprietors of Lot 768,had thought that the batas separating the two lots was the boundary but that the deceased thought otherwise and also asked the Survey Department to determine the true boundary. The plaintiff alleged that the Survey Department found that the defendants had encroached upon Lot 769 and he therefore alleged loss and damage had been suffered by the estate of the deceased. The plaintiff further alleged that the first and third defendants had fraudulently misrepresented to the land scheme officer at the land scheme hearing on 3 April 1982 that the boundary between the two lots was constituted by the batas and not by the boundary stones laid by the Survey Department. The defendants averred that the batas had always been the boundary between the lots and that the plaintiff never offered or produced any evidence at the land scheme hearings as regards the determination of the new boundary by the Survey Department.

The first question that arose was whether the plaintiff had locus standi to bring the action. He had earlier in the trial told the court that he had no share or proprietary interest in Lot 769 as it had been equally divided between his two brothers and sister. His counsel had then conceded the point but later he withdrew his earlier admission upon the ground that the plaintiff was the personal representative of the estate of the deceased who was the original owner of Lot 760.

The first land scheme hearing was on 23 July 1981 and the appeal before the district officer was on 3 April 1982. At the first hearing Lot 769 was ordered to be split into four parts – A for an irrigation reserve, B and C as parts of Lot 769 and D (the disputed portion) to be added on to Lot 768 in the names of the second and third defendants in half share each. At the same time, the plaintifff's two brothers and sister were given a one-third share each of parts B and C. The district officer hearing the appeal confirmed the earlier decision and at the same time detailed his reasons for deciding the way he did having taken into account the fact of the dispute as to the boundary between Lots 768 and 769. The date of the registration of possessory title of Lot 768 including the disputed portion was 8 February 1982 and on the evidence it became absolute on 8 August 1983. The plaintiff filed the instant suit only on 16 October 1983. Limitation had not been pleaded by the defendants in the defence, however.

Held, dismissing the application:

(1) The plaintiff's counsel could retract the earlier admission of no locus standi. The suit involved the disputed portion of Lot 769 as regards which the estate of the deceased was interested as opposed to the undisputed part already given to the plaintiff's two brothers and sister. The plaintiff had the locus standi to bring the action as he was the administrator of the estate of the deceased.

(2) Under s 10 of the Kelantan Land Settlement Ordinance, any person claiming superior title has to file an action within 18 months (formerly three years) from the date of registration of possessory title but the plaintiff here had filed the suit only on 16 October 1983. Although the defendants had not pleaded limitation, s 4 of the Limitation Ordinance 1953 did not apply because s 3 thereof states that it does not apply where any other written law prescribes a period of limitation. It follows that, since s 10 of the Kelantan Land Settlement Ordinance provides for limitation, the Limitation Ordinance does not apply. The defendants could therefore rely on the defence of limitation and in the result, the plaintiff was two months out of time.

(3) On the other hand, if the plaintiff was bringing an action under s 16 of the Kelantan Land Settlement Ordinance by way of appeal, again he was out of time as the appeal period had lapsed a month after the district officer's decision on 3 April 1982. Even if he had filed the appeal in time, the appeal would certainly fail as the facts argued at the appeal stage were the same as those set out at the land scheme hearings.

(4) On the allegation of fraud, considering the evidence presented before the court, and that the court accepted the fact that the batas had always been the boundary between the two lots, this was well below the burden of proof necessary for such allegation.

(5) It was abundantly clear that all parties involved had relied only on the batas as the boundary from way back in 1926 and upon a balance of probabilities there had never been any dispute as to this being the boundary. The inescapable conclusion was that the batas had always been the boundary between Lots 768 and 769 and it did not cause any problem until new boundary stones were placed during the time the third defendant was in possession.

(6) Since the boundary and the area of the lots were in dispute and they affected the question of possession, the matter was rightly decided under the purview of the Kelantan Land Settlement Ordinance.

Cases referred to

1 *Che Esah & Anor* v *Che Limah* [1966] 1 MLJ 36 (folld)
2 *Nederlandsche Handel-Maatschappij NV* v *Koh Kim Guan* [1959] MLJ 173 (refd)

Legislation referred to

Kelantan Land Settlement Ordinance 1955 ss 10, 16
Limitation Ordinance 1953 ss 3, 4

C Jegathesan for the plaintiff.
P Dorairaj for the defendants.

Cur Adv Vult

Abdul Malek J: The plaintiff is praying:

(a) for a declaration that the true boundary between all that parcel of land known and identified as Lot 768

and all that parcel of land known and identified as Lot 769 in Mukim Gong Nangka, Daerah Bukit Awang, Jajahan Pasir Mas is as determined by the Pejabat Ukur before 18 August 1962;

(b) for a declaration that previous to the determination of the boundary by the Pejabat Ukur there was a mistake common to both the deceased Haji Mohamed bin Ahmad (hereinafter called 'the deceased') and the defendants;

(c) for a declaration that thereafter the defendants fraudulently misrepresented to the Land Scheme Officer on 3 April 1982 at the Land Scheme Hearing under Reference UB (PP) 6/29/25/02 that the boundary between Lot 768 and Lot 769 was as constituted by a batas and not by the boundary stones laid by the Pejabat Ukur;

(d) consequentially for the said (third) defendant to observe the true boundary as determined by the Pejabat Ukur and to vacate that part of the land encroached by her and do forthwith deliver up vacant possession thereof to the plaintiff;

(e) for damages for trespass to land to be assessed; and

(f) costs.

The statement of claim states that the plaintiff is suing as legal representative of the estate of the deceased vide Grant of Letters of Administration dated 28 March 1983 in the Kota Bharu High Court as a result of the Petition for Letters of Administration No 76/82. The deceased was the registered proprietor of Lot 769 which was originally 6 acres 008 depas in area after which it was reduced to 5 acres 723 depas in area after being partly acquired for irrigation purposes.

The plaintiff further alleges in his pleadings that the original registered proprietor of Lot 768, which was adjacent to Lot 769, was Jusoh bin Musa on whose death it was transmitted to his sons the first and second defendants in equal shares. Jusoh and the two defendants had relied on the batas separating Lots 768 and 769 as the boundary but the deceased thought otherwise and had requested the Survey Department to determine the true boundary.

However, despite this new determination by the Survey Department, the plaintiff alleges that all three defendants persisted in ignoring the true boundary resulting in the encroachment of Lot 769 to the extent of 19 depas and loss and damage to the estate of the deceased. The plaintiff also alleges that all the defendants knew of the determination of the new boundary and that their previous reliance on the batas as the boundary was a mistake.

The plaintiff further states that, despite knowing this, the first and third defendants falsely misrepresented to the hearing officers at the Land Scheme hearing both at first instance on 23 July 1981 and at appellate level on 3 April 1982 that the batas was the actual boundary.

All the three defendants, in their separate statements of defence, denied the allegations in the statement of claim. They averred that the batas had always been the boundary between Lots 768 and 769 and that the plaintiff never offered or produced any evidence at the Land Scheme hearings as regards the determination of the new boundary by the Survey Department. They also pleaded that the plaintiff had not given or stated any particulars of the fraud or fraudulent misrepresentation alleged by him as required by law.

On the first date fixed for hearing the plaintiff was absent and the defendants insisted on calling a witness of advanced age (DW1) whom they had called to testify. DW1, who is 91, told the court that he was Penghulu of Kampong Bukit Awang between 1937 and 1968 and he was aware of Lot 768, which belonged to Jusoh bin Musa, and Lot 769, which belonged to the deceased. He remembered that a bund or batas separated the two lots. There were no boundary stones, he added, before the Land Scheme entered the land. There was also no dispute as to the boundary and he did not recall any survey being done on the land.

DW1 also gave evidence that after Jusoh bin Musa died, the first and second defendants occupied the land by planting padi. Again there was no dispute as to the boundary. On the second defendant's death, the second defendant's son took over his share and the first defendant subsequently sold his half share to the third defendant. DW1 agreed under cross-examination that a Penghulu need not be informed if a survey was done on lands within his mukim.

On the second date of hearing, counsel for the plaintiff informed the court that since the dispute involved only 19 depas, the matter could easily be solved by title deeds and he was willing to leave it to the court for the lands to be surveyed to determine the actual acreage. Counsel for the defendants disagreed on the grounds that the dispute involved a substantial area and not 19 depas, that the matter had been decided at the Land Scheme hearings both at first instance and at the appeal stage and that the said Land Scheme decision had been certified by the Survey Department.

Counsel for the plaintiff argued that the Land Scheme hearings dealt only with possession as opposed to ordinary titles and still insisted on a survey so that the trial could be dispensed with. Counsel for the defendants insisted on the trial if there was no settlement and the court decided to continue with the case in the circumstances.

The plaintiff (PW1) then proceeded to give evidence. He said Lot 769 belonged to his late father and he had worked on it even in the deceased's lifetime. It was padi land with an area of 6 acres 008 depas originally. The acreage after acquisition was 5 acres 723 depas.

According to PW1 there had been a dispute between the deceased and Jusoh bin Musa, who owned the adjacent Lot 768, as early as 1957 as regards the boundary. There was no batas yet only grass. The deceased had on thinking that he was occupying a smaller piece of land than he ought to, had asked a surveyor named Adam Yaakob (PW2) to do a survey but it was frozen as Jusoh bin Musa had objected to it. This was the position until the Land Scheme hearing. Before this, the Land Scheme had done a survey with the same results as that of PW2's. However, the owners of Lot 768 were not satisfied and asked for a hearing. At the hearing it was decided that the plaintiff's possession was only up to the batas but the plaintiff told the court that he wanted the boundary to be determined according to the acreage and not according to the batas.

At this juncture, the plaintiff was asked as to his interest in Lot 769 and he admitted that it now belonged to Hussein Mohamad, Kamariah Mohamad and Kamaruddin Mohamed (his brothers and sister) who had not filed any action to determine the boundary. Learned counsel for the plaintiff told the court that all along he had thought the plaintiff was the registered proprietor and asked for a postponement to sort things out. Despite the defence counsel's objections, the court allowed an adjournment in the circumstances.

During this interim period, counsel for the plaintiff applied by way of summons-in-chambers to substitute for the plaintiff his two brothers and sister who actually owned Lot 769 and to amend relevant parts of the statement of claim but this met with some opposition from counsel for the defendants. In the result, the learned senior assistant registrar dismissed the application on the grounds that the plaintiff had no locus standi to apply for the amendments and also because there was no consent in writing from the newly named plaintiffs to be a party to the action nor any sworn affidavits from them supporting the said application by the plaintiff.

On the third date of hearing, the learned counsel for the plaintiff submitted to the court that he was withdrawing his appeal against the decision of the learned senior assistant registrar as he was retracting his earlier agreement that the plaintiff had no locus standi. On reconsideration, he was of the view that the plaintiff had locus standi as he was suing on behalf of the deceased's estate. The suit concerned the disputed part of the land for which the estate was interested and not the undisputed portion which had been given to his two brothers and sister.

Learned counsel for the defendants argued that it was the plaintiff's counsel who had earlier agreed on his client's lack of legal standing and it was he who had asked to amend the statement of claim. He also pointed out that the action was barred by limitation in view of the Kelantan Land Settlement Ordinance 1955 (hereinafter called 'the Ordinance') which point was neither raised in the pleadings nor in the earlier arguments.

Having considered the submissions on this point, I was of the opinion that based on the case of *Che Esah & Anor* v *Che Limah*,[1] the plaintiff's counsel could retract the earlier admission of no locus standi. I also held that the suit involved the disputed portion of Lot 769 as regards which the estate of the deceased was interested as opposed to the undisputed part already given to the plaintiff's two brothers and sister and that the plaintiff was the legal representative of the deceased's estate. Since limitation was not pleaded by the defendants, I concluded that it was premature for me to decide on this point without having heard the whole matter as the question of when the boundary dispute started was in fact a matter in issue. In the circumstances, I allowed the case to proceed but directed the plaintiff to pay costs for this application.

PW1, under continued cross-examination, testified that the third defendant occupied and cultivated half of Lot 768 from either 1969 or 1970 up to the batas. He agreed that at both the Land Scheme hearings at first instance and on appeal, possessory title had been given to the third defendant for the said portion she occupied.

Under re-examination, PW1 stated that the deceased tried to solve the boundary problem in 1956 or 1957 but met with objections from the adjacent landowner. As a result no boundary stones were placed. When questioned by the court, he admitted that nothing happened from 1958, when the deceased passed away, to 1983, when the suit was filed, as regards the new proposed boundary.

The settlement officer PW1 said the deceased had called to place the boundary stones. PW2 told the court he could not remember the plaintiff nor recall being called by the deceased to resolve the boundary dispute between the two lots. He had been a settlement officer for 38 years in the area but had come to court without the relevant records. He, however, brought the plans available at the Pasir Puteh Land Office.

From the plans, he stated that Lot 769 was recorded as a plane table lot on 4 November 1926 in the name of Hamat bin Awang with an area of 6 acres 008 depas. From the plan of the boundary before 1983 (P2), he added that Lot 768 was 2 acres 744 depas. From another plan PA 52898 (P3), he gave evidence that Lot 769 became Lots 1378 and 1379 after a survey in 1981 as a result of acquisition for an irrigation canal for which 280 depas were taken. Lot 1378 was 5 acres 858 depas and Lot 1379 007 depas.

By another plan (P4), Lots 1378 and 768 had been amended by the Survey Department on 8 November 1982 as Lot 1524 with an area of 4 acres 988 depas and Lot 1523 with an area of 3 acres 538 depas.

By another plan (P5) prepared on his instructions and based on P4, after 1982 Lot 768 increased by 867 depas in acreage from 2 acres 671 depas in P3 to 3 acres 538 depas in P4. Lot 769 which was originally 6 acres 008 depas based on a plane table survey was reduced after the irrigation acquisition on 7 November 1976 to 5 acres 728 depas. By P3 it increased to 5 acres 865 depas in 1981 and by P4 it had reduced in area to 4 acres 988 depas.

Under cross-examination, PW2 agreed that the records at the Pasir Puteh Land Office do not show any complaint as to the dispute. He said that P2 was not the official map of the area but only a guide. P3, he added, was a theodolite survey plan and was prepared at the request of the Land Scheme. In P4, he agreed that the boundary line marked in red was similar to that in P4.

On cross-examination by the court he again stated that he was the settlement officer for Pasir Puteh from 1956 to 1967 but did not remember going to the lands in dispute. He said that there was no record of any survey done from 1926 to 1981 which indicated that landowners never applied for a survey during that period. He also said that P3 was provisional unless amended and it was so amended by P4 as a result of objections by landowners to the Land Scheme. For any survey, he said, the Land Scheme had a bigger say than the Survey Department.

The Director of Survey, Kelantan (PW3) next told the court that P2 was a plane table sheet where boundary marks are not planted and bearing distances not shown. Lot 768 was 2 acres 744 depas and Lot 769 6 acres 008 depas but these were approximate figures. P3, he said, was a survey done by theodolite and chain where boundary marks are planted. Lot 769 was divided into three parts – Lots 1378, Lot 1379 and the Drainage and Irrigation Department reserve. Lot 1388 was 5 acres 859 depas, Lot 1379 007 depas and the Drainage and Irrigation Department reserve 230 depas totalling 6 acres 096 depas in all. Lot 768 was 2 acres 671 depas. The request to prepare P3 came from the Land Scheme. The plan was approved on 20 December 1981 and the boundary stones were placed in accordance with the request and in accordance with P2.

The first defendant (DW2) who is also appearing for the second defendant, since deceased, gave evidence that he and his brother, the second defendant, had been given a half share each of Lot 768 by his father about ten years before his father died. He had occupied his half share another twenty years after that. He said that during his father's lifetime and throughout his occupation of the land, it was planted with padi and so were the surrounding lands. He added that their half shares were separated by a batas and similarly Lots 768 and 769 were also separated by batas. Throughout his 30 years of occupation, he said, no one ever disputed the batas as the boundary.

After 30 years, DW2 said he had sold his half share to the third defendant about 15 years back. Again there was no dispute as to the boundary until the Land Scheme came. DW2 added that when he was in possession, Lot 769 was in the possession of the deceased who was his cousin. The deceased never disputed the batas as the boundary either with DW2's father or DW2. Upon the death of the deceased, the plaintiff continued with the cultivation but never disputed the batas as the boundary. Under cross-examination, he said he did not have the relevant quit rent receipts now and that he was not aware of the acreage of Lot 768.

The third defendant (DW3) told the court that she knew the first defendant when she bought his half share of Lot 768 for $3,200. She said no one protested as to the batas being the boundary after she had bought this piece of land some 15 years before the trial. In fact, she said, no one had protested about the batas being the boundary even before that. She said she would know as she had lived in the area since 1949 and had several other pieces of land in the same area. She added that when she was working on the land with her husband, the plaintiff and his mother were working on the adjoining land but they never protested as to the batas being the boundary.

The Pengarah Penyelesaian Tanah Kelantan (DW4) gave evidence that before the Land Scheme, all the lots in the area had the batas as boundaries. When the Land Scheme entered the area, his officer made a request for a survey. They issued P2 first. DW4's officer would then hold an inquiry and issue the relevant order for the Survey Department to make a survey. The result was P3. Based on P3 they would settle the boundary disputes. If there was no objection from any party, P3 would be the final plan.

As regards Lots 768 and 769 he said that the third defendant had raised an objection. The inquiry was held before Encik Hasbullah Hassan on 23 July 1981. The result was that Lot 769 was divided into four portions – A for the irrigation canal reserve, B and C registered in Hussein Hj Muhamad, Kamariah Mohamad and Kamaruddin Mohamad one-third share each while D was added on to Lot 768.

DW4 added that there was another hearing on 3 April 1982 which confirmed the earlier decision. He also said that the estate distribution for Lot 769 was also decided at the Land Scheme hearing with Hussein, Kamariah and Kamaruddin getting one-third share each with the consent of all present.

DW4 also told the court that before P3, no survey had ever been done and the first one was only at the request of the Land Scheme. After the dispute was sorted out by the Land Scheme, a request was made to the Survey Department to survey, the result of which was

P4. Based on P4, the document of title was issued to the third defendant – D17 (original extract D18).

The third defendant's husband (DW5) said that he had lived in the area since the age of ten and corroborated the testimony of the first and third defendants on the material details. He reiterated that there was no dispute as to the batas as the boundary until he saw boundary stones placed along a fresh boundary not at the batas which caused his wife's land to get smaller. When he complained to the plaintiff, he said he could not interfere as it belonged to his brothers and sister. In view of that, the third defendant complained to the Land Scheme which decided in her favour.

An ex-Penghulu of the area (DW6) testified that he was related to the plaintiff but not the defendants. He was Penghulu for nine years and was aware, even when he was not the Penghulu, of the history of the two lots. He said that there had never been a dispute as to the batas being the boundary until the Land Scheme came.

At the request of learned counsel for the plaintiff, the senior assistant district officer, Pasir Puteh, was called as a court witness. According to CW1, Lot 769 was first alienated to Hamat bin Awang on November 1926. On 13 February 1978, 280 depas were acquired for an irrigation canal from the original area of 6 acres 008 depas leaving an area of 5 acres 728 depas. Before this acquisition, it was transferred to the deceased on 13 February 1952. When the Land Scheme entered, a new geran mukim was issued on 8 February 1982 – 298 and 299. Because of the acquisition, it was divided into three portions – Lot 1524 GM 298 with 4 acres 989 depas and Lot 1379 GM 299 with 007 depas. The total area was 4 acres 996 depas. If compared to the original area of 5 acres 728 depas after the acquisition of 280 depas, it had reduced in size by 732 depas.

CW1 also said that the quit rent paid on 4 November 1926 was $3.60, in 1950 $4.50, in 1965 $10, on 1 January 1970 $12 and on 1 January 1984 $21 for Lot 1524 and $1 for Lot 1379.

As regards Lot 768, CW1 told the court that it was registered on 4 November 1926 to Jusoh bin Musa, transferred to the first and second defendants in 1959 at half share each of the 2 acres 744 depas and in 1970 the first defendant's share was transferred to the third defendant. After the Land Scheme the geran mukim number was 265 on 8 February 1982 with an area of 3 acres 538 depas. If compared to the original area it had increased by 795 depas.

The quit rent for Lot 768 was $1.60 from 4 November 1926, $21 in 1950, $4.50 in 1965, $5.50 on 1 January 1970 and $9 on 1 January 1984.

CW1, in answer to questions by plaintiff's counsel, stated that for 56 years there was no record of any complaints by the owner of Lot 769 as to the area. In answer to questions by counsel for the defendants, he said that 8 August 1983 was the last date any objections could be made as regards the possessory title given to the third defendant as regards Lot 768 under the Ordinance.

The first question that needs to be decided is whether the plaintiff has locus standi to bring this action. He had earlier in the trial told the court that he had no share or proprietory interest in Lot 769 as it had been equally divided between his two brothers and sister Hussein, Kamaruddin and Kamariah respectively. His counsel had then conceded on this point which had resulted in some delay in the hearing of this suit.

Later, his counsel withdrew his earlier admission on the ground that the plaintiff was the legal representative of the estate of the deceased who was the original owner of Lot 769. As I have earlier stated, based on *Che Esah & Anor* v *Che Limah*,[1] I allowed counsel to withdraw his earlier admission as I held, upon due reconsideration of the pleadings, that the plaintiff had the locus standi to bring the action. In any case, his two brothers and sister got their respective one-third shares only at the Land Scheme hearing on 23 July 1981.

Much has been said about the provisions of the Ordinance by both counsel in their written submissions. Going on the authorities cited as regards matters governed by the Ordinance, it is obvious that an appeal under s 16 of the Ordinance by a person aggrieved by an order made in pursuance of the Ordinance is to the District Officer and subsequently to the High Court and where superior title is alleged, the suit, action or proceeding must be brought under s 10 of the Ordinance within 18 months of the date of registration of such possessory title.

In this case the first Land Scheme hearing was on 23 July 1981 and the appeal before the District Officer was on 3 April 1982. At the first hearing Lot 769 was ordered to be split into four parts – A for the irrigation reserve, B and C as part of the said lot and D (the disputed portion) to be added on to Lot 768 in the names of the second and third defendants at half share each. At the same time the plaintiff's two brothers and sister were given a one-third share each of B and C.

The District Officer hearing the appeal confirmed the earlier decision and at the same time detailed his reasons for deciding the way he did having taken into account the fact of the dispute as to the boundary between Lot 768 and Lot 769. He even went on to quote the objects and reasons for the Ordinance which reads 'the great advantage of this system is that the District Officer holding the hearing will be called upon to decide questions of fact only. He is to decide who in fact is in possession. He will not have to decide the right to possession, only the fact of possession'.

The date of the registration of possessory title of Lot 768 including the disputed portion was 8 February 1982. According to CW1, this became absolute on 8 August 1983. Under s 10 of the Ordinance, any person claiming superior title has to file an action within 18 months (formerly three years) from the date of registration of possessory title but the plaintiff here had filed the suit only on 16 October 1983. Limitation has not been pleaded by the defence as specifically required by s 4 of the Limitation Ordinance 1953 but s 3 thereof states that it does not apply where any other written law prescribes a period of limitation. It follows that since s 10 of the Ordinance has provided for it, the Limitation Ordinance 1953 does not apply to the present case. In the result, the plaintiff is two months out of time.

On the other hand, if he is bringing an action under s 16 of the Ordinance by way of appeal, again he is out of time as the appeal period had lapsed a month after the District Officer's decision on 3 April 1982. Even if he had filed the appeal to the High Court on time, decided cases on this point have ruled that the appeal will certainly fail if the facts argued at the appeal stage are the same as those set out at the Land Scheme hearings.

The plaintiff had also alleged fraud on the part of the defendants but no particulars of fraud had been pleaded except for para 13 of the statement of claim. Considering the evidence presented before this court, and the court accepts the fact that the batas had always been the boundary between the two lots, this is well below the burden of proof necessary for such allegation as propounded in the celebrated case of *Nederlandsche Handel-Maatschappij NV (Netherlands Trading Society)* v *Koh Kim Guan*.[2]

The area of the disputed portion is in fact very much in doubt even at this stage. The plaintiff in his statement of claim pleaded that the disputed area was only 19 depas. In his statement of claim and in his evidence also he stated that the original area of 6 acres and 008 depas became 5 acres 723 depas after the irrigation acquisition. Later we are told the acquisition was 280 depas which meant that the balance should have been 5 acres 728 depas. PW2 told the court that by P3, Lot 769 became Lot 1378 with 5 acres 858 depas and Lot 1379 with 007 depas totalling 5 acres 865 depas. With the irrigation acquisition of 280 depas the area in Lot 769 would be 6 acres 145 depas and not 6 acres 008 depas as stated by PW1.

PW2 further went on to say that by P4, Lot 1378 became Lot 1524 with an area of 4 acres 988 depas and Lot 768 became Lot 1523 with an area of 3 acres 538 depas. By P5 which was prepared after 1982, this area for Lot 768 was confirmed which meant an increase of 867 depas from its original area of 2 acres 671 depas. However, the records show that the original acres of Lot 768 was 2 acres 744 depas not 2 acres 671 depas. The original area of Lot 769 of 6 acres 008 depas was reduced to 5 acres 728 depas after the 280 depas acquisition for irrigation purposes on 7 November 1976 but PW2 went on to say that by P3 it increased to 5 acres 865 depas in 1981 and later by P4 reduced to 4 acres 988 depas. No explanation is put forward, however, for this increase and decrease in area with every change of plan and survey.

In contrast, PW3 gave evidence that Lot 769 vide P3 became Lot 1378 with an area of 5 acres 859 depas, Lot 1379 007 depas and the drainage reserve 230 depas. The total was 6 acres 096 depas. This of course did not tally with the figures given by PW2. Lot 768, he said, became 2 acres 671 depas from the original area of 2 acres 744 depas. Again when CW1 testified, another set of different figures were thrown in. This only illustrated the fact that no one, not even the officers concerned in the relevant departments, could tell the exact acreage of the two lots which fact is admitted by the parties to the suit.

Taking the totality of the evidence, it is abundantly clear that all parties involved had only relied on the batas as the boundary from way back in 1926 and upon a balance of probabilities, I accept the fact that there had never been any dispute as to this being the boundary. The plaintiff of course had stated that his late father had objected to it in 1956 or 1957 but could not really substantiate this allegation. In any case he agreed that nothing happened from the time his father died in 1958 to 1983 when this dispute arose. All the other witnesses had also testified that the batas boundary was never brought up at any time from 1926. In consequence, I came to the inescapable conclusion that the batas had always been the boundary between Lots 768 and 769 and it did not cause any problem until new boundary stones were placed during the time the third defendant was in possession. In fact no one else complained of the boundary until she reported the matter to the Land Scheme. I was also of the view that since the boundary and the area were in dispute and it affected the question of possession, the matter was rightly decided under the purview of the Ordinance.

On these considerations, after holding that all along from 1926 the respective occupants of Lots 768 and 769 had been cultivating their respective portions based on the batas as the boundary and that no one had raised any objections to this and considering that the exact areas of the two lots are still in doubt despite the surveys done as seen from the conflicting figures given by the officers from the different departments, I was of the view that the best solution to the problem in the circumstances would be as decided by the Land Scheme hearing officer that possessory title should be given to the third defendant as regards her half share of Lot 768 based on the area she actually occupied since she purchased that portion from the first defendant who had also occupied that same area like his father before him, that is, the area up to the batas between Lots 768 and 769. I was also of the opinion that

there was no fraudulent misrepresentation by the first and third defendants at the Land Scheme hearings as regards the boundary considering the evidence given before me in the light of the circumstances of this case.

Consequently since the parties and the subject matter are the same before this court as before the Land Scheme officers at first instance and at appellate level, if this had been an appeal under s 16 of the Ordinance, which it is not, it would have been in any case dismissed with costs.

Again, if this was an attempt to assert superior title under s 10 of the Ordinance for the disputed portion, it was as has been held earlier out of time as possessory title of the said disputed portion had been granted to the third defendant more than 18 months before the filing of the suit. It does not really matter that no one seems to know the exact area of the disputed portion, considering the evidence given, but this court is well assured that both the plaintiff and the defendants and in fact all the witnesses for both sides, including the two officers who conducted the Land Scheme hearings are actually aware where and what the disputed portion is.

I feel compelled to mention in passing the supplementary written submission of learned counsel for the plaintiff as regards the choice of words by the third defendant's husband (DW5) in his testimony and by the third defendant in her letter P12 that actually it was the defendants' land that had encroached into the plaintiff's land. I was aware of this when DW5 gave evidence and made the interpreter repeat the question but he chose to stick to his original answer. However, considering the totality of the evidence especially the fact that the plaintiff replied that he was not in a position to interfere, the very reason this action had been filed and the demeanour and social standing of the parties concerned, I was of the opinion that what DW3 and DW5 really meant was that it was the plaintiff's land that had encroached onto theirs. This failure to express themselves clearly as to which lot encroached onto which lot should not be taken to mean the opposite of what they meant otherwise why should the third defendant take the trouble to complain to the Land Scheme and maintain her complaint at three levels of hearing that it was the plaintiff's land that had encroached onto hers with the placing of the new boundary stones? For this reason, I found the supplementary submission completely devoid of merit.

Accordingly, I dismissed the plaintiff's claim with costs.

Application dismissed.

Solicitors: *C Jegathesan*; *P Dorairaj & Co.*

Reported by *PS Ranjan*

PL Construction Sdn Bhd v Abdullah bin Said

HIGH COURT (JOHORE BAHRU) – CIVIL SUIT NO 23-1339 OF 1986
ZAKARIA YATIM J
17 MARCH 1988

Civil Procedure – Judgment in default of defence – Appeal against order setting aside judgment – Whether judgment irregular if no affidavit had been filed stating compliance with 48-hour notice under Legal Profession (Practice and Etiquette) Rules 1978 – Whether defence on the merits exists – Legal Profession (Practice and Etiquette) Rules 1978, r 56 – Rules of the High Court 1980, O 13 r 8

Words and Phrases – 'Defence on the merits'

The defendant is a main contractor undertaking the construction of a school in Johore. The plaintiff agreed to undertake the construction of the school from the defendant and it was also agreed that the defendant would pay the plaintiff for the progressive work carried out by the plaintiff as and when the defendant was requested to pay by the plaintiff. Subsequently, the plaintiff demanded the payment of a certain sum but the defendant failed to pay. The plaintiff filed their writ and subsequently judgment in default of defence was given against the defendant. The defendant then filed an application to set aside the judgment on the ground that the plaintiff did not file an affidavit to say that the 48-hour notice under r 56 of the Legal Profession (Practice and Etiquette) Rules 1978 had been complied with. The application was granted by the senior assistant registrar. The plaintiff appealed against this order of the registrar contending that there was no defence on the merits.

Held, dismissing the appeal but ordering that costs be borne by the defendant:

(1) The 48-hour notice is only a practice rule as embodied in r 56 of the Etiquette Rules 1978. The plaintiff had complied with the rule and there is no need to file an affidavit to say that the rule had been complied with.

(2) The term 'defence on the merits' means a defence which discloses an arguable and triable issue. From the draft statement of defence, there is a defence on the merits or at least there is an arguable case or an issue which should go for trial.

Cases referred to

1 *Asia Commercial Finance (M) Bhd* v *Bank Bumiputra Malaysia Bhd & Ors* [1988] 1 MLJ 33 (folld)
2 *Million Group Credit Sdn Bhd* v *Lee Shoo Khoon & Ors* [1986] 1 MLJ 315 (refd)
3 *Seng Huat Hang Sdn Bhd* v *Chee Seng & Co Sdn Bhd* [1986] 1 MLJ 348 (refd)
4 *Fabrique Ebel Societe Anonyme* v *Syarikat Perniagaan Tukang Jam City Port & Ors* [1988] 1 MLJ 188 (refd)
5 *Evans* v *Bartlam* [1937] AC 473 (folld)
6 *Bank Bumiputra Malaysia Bhd* v *Majlis Amanah Ra'ayat* [1979] 1 MLJ 23 (folld)
7 *B Dialdas & Co (Pte) Ltd* v *Sin Sin & Co & Ors* [1984] 2 MLJ 223 (folld)

Legislation referred to

Legal Profession Act (Practice and Etiquette) Rules 1978 r 56
Rules of the High Court 1980 O 13 r 8

Tay Siew Fong (*Miss*) for the plaintiff/appellant.
Gan Kim Sing for the defendant/respondent.

Cur Adv Vult